

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

v.

FROYLAN CONTRERAS,

Petitioner.

No. CR-07-6036-FVS
CV-11-5033-FVS

ORDER DENYING PETITIONER'S
SECTION 2255 MOTION

THIS MATTER comes before the Court without oral argument based upon Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. Petitioner is proceeding pro se.

BACKGROUND

The Court sentenced Petitioner, on June 17, 2008, to a term of 151 months imprisonment following his entry of a guilty plea to the offense of possession of a controlled substance (methamphetamine) with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

Judgment was entered on June 20, 2008, and Petitioner appealed his sentence June 25, 2008. On November 2, 2009, the Ninth Circuit Court of Appeals issued its mandate affirming the District Court's ruling. (Ct. Rec. 127). On February 18, 2011, over one year and three months later, Petitioner moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

1 **STANDARD**

2 28 U.S.C. § 2255 provides, in part:

3 A prisoner in custody under sentence of a court established by
4 Act of Congress claiming the right to be released upon the ground
5 that the sentence was imposed in violation of the Constitution or
6 laws of the United States, or that the court was without
7 jurisdiction to impose such sentence, or that the sentence was in
8 excess of the maximum authorized by law, or is otherwise subject
9 to collateral attack, may move the court which imposed the
10 sentence to vacate, set aside or correct the sentence.

11 A petitioner is entitled to an evidentiary hearing on the motion
12 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and
13 the files and records of the case conclusively show that the prisoner
14 is entitled to no relief. This inquiry necessitates a twofold
15 analysis: (1) whether the petitioner's allegations specifically
16 delineate the factual basis of his claim; and, (2) even where the
17 allegations are specific, whether the records, files and affidavits
18 are conclusive against the petitioner. *United States v. Taylor*, 648
19 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal
20 quotations, citations and footnote omitted).

21 The statute provides that only if the motion, file, and records
22 "conclusively show that the movant is entitled to no relief" may the
23 Court summarily dismiss the motion without sending it to the United
24 States Attorney for response. 28 U.S.C. § 2255. The rules regarding
25 Section 2255 proceedings similarly state that the Court may summarily
26 order dismissal of a § 2255 motion without service upon the United
27 States Attorney only "if it plainly appears from the face of the
28 motion and any annexed exhibits and the prior proceedings in the case
29 that the movant is not entitled to relief in the district court."
30 Rule 4(a), Rules-Section 2255 Proceedings. Thus, when a Petitioner
31 fails to state a claim upon which relief can be granted or when the

1 motion is incredible or patently frivolous, the district court may
2 summarily dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d
3 915, 917 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526
4 (9th Cir. 1985).

5 DISCUSSION

6 I. Statute of Limitations

7 A one-year limitation period applies to the filing of a Section
8 2255 motion. The one-year limitation period runs from the date
9 Petitioner's judgment of conviction became final. Petitioner took a
10 direct appeal but did not seek certiorari. In these circumstances,
11 the limitations period began to run ninety days after the direct
12 appeal was denied. *Derman v. United States*, 298 F.3d 34, 41-42 (1st
13 Cir. 2002). Petitioner's direct appeal was denied on November 2,
14 2009, so the period began to run on January 31, 2010, the date his
15 conviction became final. Petitioner therefore had until January 31,
16 2011, to file a section 2255 motion. Petitioner's Section 2255
17 motion, dated February 1, 2011, was received by the Court on February
18 18, 2011. Because Petitioner failed to file his petition by January
19 31, 2011, Petitioner's Section 2255 motion is time-barred, absent a
showing of equitable tolling.

20 Given that Petitioner has not claimed any external circumstances
21 delayed him from timely filing his petition, Petitioner is unable to
22 establish that he is entitled to the equitable tolling exception.
23 *See, Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) ("When
24 external forces, rather than a petitioner's lack of diligence, account
25 for the failure to timely file a claim, equitable tolling may be
26 appropriate.").

1 Petitioner's Section 2255 motion was not filed within one year
2 from the date his judgment of conviction became final, and Petitioner
3 is not entitled to the equitable tolling exception. Accordingly,
4 Petitioner's claims are barred as untimely.

5 **II. Procedural Default**

6 In any event, Petitioner has procedurally defaulted his Section
7 2255 claims by failing to raise them on direct appeal to the Ninth
8 Circuit.

9 Courts generally apply a procedural default rule barring Section
10 2255 relief on claims Petitioner could have, but did not raise on
11 appeal. *Reed v. Farley*, 512 U.S. 339 (1994) (where petitioner,
12 whether state or federal prisoner, fails to properly raise claim on
13 direct review, the writ is available only if the petitioner
14 establishes cause for the waiver and shows actual prejudice from the
15 alleged violations). On direct appeal, Petitioner challenged only the
16 Court's order denying his motion to suppress. (Ct. Rec. 126).
17 Petitioner did not raise any of the claims asserted in his current
18 petition on direct appeal. (Ct. Rec. 128). Since Petitioner has
19 defaulted these claims, he cannot rely upon them to obtain relief
20 under 28 U.S.C. § 2255 unless he demonstrates both cause for the
21 default and actual prejudice as a result of the errors that allegedly
22 occurred. *United States v. Mejia-Mesa*, 153 F.3d 925, 928 (9th Cir.
23 1998). Petitioner has not shown cause for the default or actual
24 prejudice from the alleged violations.

25 Petitioner failed to assert his claims on direct appeal, and he
26 has not established cause or actual prejudice. Accordingly,
Petitioner's claims are also barred as procedurally defaulted.

1 It "plainly" appears from the face of Petitioner's Section 2255
2 motion and the prior proceedings in the case that Petitioner is not
3 entitled to relief. Therefore, it is not necessary to direct the
4 United States Attorney to file a response to the motion and it is not
5 necessary to conduct an evidentiary hearing. Summary dismissal is
6 appropriate.

7 The Court being fully advised, **IT IS HEREBY ORDERED** that
8 Defendant's motion to vacate, set aside, or correct his sentence
9 pursuant to 28 U.S.C. § 2255 (**Ct. Rec. 128**) is **DENIED**.

10 **The District Court Executive shall close this file as well as the**
11 **corresponding civil case: CV-11-5033-FVS.**

12 **IT IS SO ORDERED.** The District Court Executive is directed to
13 enter this order, furnish copies to **PETITIONER** and counsel for the
14 Government, and **CLOSE THE FILES**.

15 **DATED** this 16th day of March, 2011.

16 S/Fred Van Sickle
17 Fred Van Sickle
18 Senior United States District Judge
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